

EVIDENCE — DISCOVERY — WILLITS — Willits instructions concerning possible exculpatory effect of destroyed/lost evidence, in general — Revised 3/2010

Under *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), when police or other agents of the State negligently fail to preserve potentially exculpatory evidence, the defendant is entitled to a jury instruction permitting the jury to infer that the evidence would have been exculpatory. In *Willits*, the defendant entered a home carrying dynamite wired to a detonator equipped with switches. When the switches were flipped, the detonator was designed to explode; apparently, that explosion would set off the dynamite. During an altercation in the home, the detonator exploded but the dynamite did not. Investigators who examined the scene detached what remained of the detonator from the undetonated explosives and had the explosives destroyed because they were dangerous to keep. The detonator was introduced into evidence at Willits's trial. In his defense, Willits asserted that he had rigged the dynamite so that it could not explode; that the explosion of the detonator was accidental; and that he did not throw the switches. A defense expert testified that police radio transmissions might have set off the detonator. Willits was convicted. On appeal, he argued that if the destroyed explosives and attached wires had been preserved, that evidence might have aided his defense that the explosion was accidental. The Arizona Supreme Court agreed and stated that Willits was entitled to the following instruction:

If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest.

Id. at 187, 393 P.2d at 276. The *Willits* Court noted that the instruction did not force the jury to conclude that the State had any fraudulent intent in destroying the explosives:

That the jury may conclude a fraudulent intent from the spoilation or destruction of an article is a fact which may be inferred from all the evidence. Such a deduction is not necessary in order that the inference as to the true fact may operate in the defendant's favor. The jury could accept the explanation that the dynamite was dangerous to keep and still believe that this was not an adequate reason for its destruction in the light of its relative importance to the outcome of the case. Had the instruction been given, the jury would have been in the position of weighing the explanation and, if they believed it was not adequate, an inference unfavorable to the prosecution could have been drawn. "*This in itself could create a reasonable doubt as to the defendant's guilt.*"

Id. at 190, 393 P.2d at 279 [emphasis in original].

To be entitled to a *Willits* instruction, a defendant must prove both: (1) that the State failed to preserve material evidence that was accessible and might tend to exonerate him, and (2) that prejudice resulted from the failure to preserve the evidence. *State v. Fulminante*, 193 Ariz. 485, ¶ 62 at 503, 975 P.2d 75, ¶ 62 at 93 (1999); *State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985). Appellate courts review a trial court's refusal to give a *Willits* instruction for an abuse of discretion. *Id.*

A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have had a tendency to exonerate him. *State v. Fulminante*, 193 Ariz. at 503, 975 P.2d at 93; *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). In *State v. Wooten*, 193 Ariz. 357, ¶ 63, 369, 972 P.2d 993, ¶ 63, 1005 (App. 1998), the State introduced into evidence copies of tapes of telephone calls that Wooten had made from the jail. Wooten claimed that he was entitled to a *Willits* instruction because the State had not preserved the original tapes. He argued that he could not show that the original tapes had

contained exculpatory evidence, because the destruction of the tapes effectively prevented him from doing so. The Arizona Supreme Court disagreed, noting that because Wooten was a party to each of the conversations in question, he was in a position to know whether or not any exculpatory information had been excluded from the copies but failed to indicate to the trial court that any material would have been preserved on the original tapes that did not also appear on the copies. Because Wooten failed to show any prejudice, the trial court did not abuse its discretion in refusing to give the *Willits* instruction. Similarly, in *State v. Tinajero*, 188 Ariz. 350, 355, 935 P.2d 928, 933 (App. 1997), *overruled on other grounds by State v. Powers*, 200 Ariz. 363, 364, 26 P.3d 1134, 1135 (2001), the defendant was driving his truck while drunk and caused a fatal crash. The night of the crash, he told police that he was alone in the truck, but denied hitting anything. The truck was sold for salvage and destroyed. On appeal, he argued that he was entitled to a *Willits* instruction because if the truck had been preserved, he could have tested bloodstains in the truck to prove that he had been in the passenger seat, not driving. The trial court denied a *Willits* instruction, reasoning that the police had no reason to preserve the truck in light of Tinajero's admissions that he was the truck's sole occupant when the crash occurred. The Arizona Supreme Court agreed that there was no reason to believe that the truck would have provided any exculpatory evidence:

The duty of police to preserve potentially exculpatory evidence arises when the evidence is "obviously material." *State v. Perez*, 141 Ariz. 459, 463, 687 P.2d 1214, 1218 (1984). This requirement reflects the due process standard of "constitutional materiality" that governs the preservation of evidence. See *State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App.1987). To be constitutionally material, "[e]vidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant

would be unable to obtain comparable evidence by other reasonably available means." *Id.* (quoting *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984))(emphasis added). Given Tinajero's inculpatory statements on the night of his arrest, he was unable to demonstrate why police had a reason to retain the truck.

State v. Tinajero, 188 Ariz. at 355, 935 P.2d at 933.

A *Willits* instruction is not given merely because a more exhaustive investigation could have been made. *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995); *State v. Willcoxson*, 156 Ariz. 343, 346, 751 P.2d 1385, 1388 (App.1987).